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IN THE SUPREME COURT OF THE STATE OF IDAHO

2004 Opinion No. 59

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	
)	
v.)	
)	Docket No. 27975/27976
DANIEL EUGENE FISHER,)	
)	
Defendant-Appellant.)	
)	
)	

Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. James R. Michaud, District Judge.

Molly J. Huskey, Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent.

The state charged Fisher with trafficking in methamphetamine and possession of methamphetamine, case number 27975, and two misdemeanor counts of possession of marijuana and paraphernalia, case number 27976. The district court ordered a hearing to determine whether the warrant for Fisher's arrest was properly issued. Fisher asked the district court to exclude the evidence seized by the police because he claimed the search warrant was obtained with information known to be false or submitted by the police with reckless disregard of its truth. Fisher additionally asked the district court to force the state to disclose the identity of the confidential informants, who provided testimony, which led to the search of Fisher's property; Fisher also requested the district court provide a private hearing outside the courtroom on this question. The district court denied Fisher's request to learn the identity of the confidential informant, but granted the private hearing.

The district court held the hearing, but Fisher and his attorney were excluded from the hearing. The district court denied Fisher's request to exclude evidence. Thereafter, the parties

entered a plea agreement whereby the state agreed to dismiss the misdemeanors and allowed Fisher to appeal his conviction to this Court. Fisher pled guilty to the felonies. Fisher thereafter filed, with this Court, an appeal from his conviction.

Fisher contends the hearing violated his Constitutional Rights of Due Process and his right to Effective Assistance of Counsel. The state admits that the district court should have allowed Fisher and/or his counsel to be present at the hearing, if Fisher were entitled to a hearing. However, the state argues that Fisher's rights were not violated because he should not have been granted a hearing. This Court is asked to determine whether Fisher's rights have been violated.

This Court affirms the district court on grounds different than those used by the district court. Fisher failed to make a preliminary showing that he was entitled to a *Franks* hearing; therefore, the district court's error in conducting the July 26, 2001, ex parte, in-camera hearing was harmless because Fisher had no right to the hearing. Also, the state was not required to cross appeal the July 2, 2001, order because the state was not seeking affirmative relief.